No. 16-1348

IN THE

Supreme Court of the United States

MICHAEL N. CURRIER,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

On Writ of Certiorari to the Supreme Court of Virginia

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges.

As the only nationwide professional bar association for public defenders and private criminal defense lawyers, NACDL is dedicated to advancing the proper, efficient, and just administration of criminal justice. To this end, NACDL files numerous *amicus curiae* briefs each year in this Court and other federal and state courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

This case presents a question of critical importance to NACDL's members and the fair administration of justice: whether a criminal defendant effectively waives the protections of the Double Jeopardy Clause by consenting to severance of claims in order to avoid an unduly prejudicial trial.

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have filed letters with the Court providing blanket consent to the filing of *amicus* briefs.

INTRODUCTION AND SUMMARY OF ARGUMENT

A jury acquitted petitioner Michael Currier of burglarizing a home and stealing a safe that contained cash and guns, finding that Currier was not at the scene of the crime. A second jury at a second trial later convicted Currier on a felon-in-possession-of-a-firearm charge on the theory that he broke into the home and stole the safe, briefly handling the guns inside it in order to remove the cash, before throwing the safe and guns into a nearby river.

No one could reasonably dispute that, ordinarily, a second trial against Currier for felon-in-possession would be a non-starter, since the Double Jeopardy Clause's issue preclusion component forbids the prosecution from re-litigating issues decided against it in a prior trial. *Ashe v. Swenson*, 397 U.S. 436, 445-46 (1970). After all, if Currier didn't break into the home and steal the safe, he couldn't possess the guns inside it. But the court below held that Currier waived his double jeopardy rights by consenting to severance of the felon-in-possession charge from the burglary and theft charges. *See* J.A. 51. The charges were severed under a Virginia law providing that, to avoid unduly prejudicing defendants, "unless the Commonwealth and defendant agree to joinder, a trial court must sever a charge of possession of a firearm by a convicted felon from other charges that do not require proof of a prior conviction." *Hackney v. Commonwealth*, 504 S.E.2d 385, 389 (Va. Ct. App. 1998) (en banc).

Petitioner aptly explains the multitude of reasons that this Court should reverse. *Amicus* submits this brief to amplify one particular reason: the decision below is at odds with decades of this Court's jurispru-

dence refusing to find waiver where criminal defendants are put to an unfair Hobson's choice of sacrificing one important right in order to preserve another.

That is precisely what occurred here. Currier faced the choice of enduring either (1) a single trial at which evidence of his prior felony conviction relevant to the felon-in-possession charge would unduly prejudice him with respect to the burglary and theft charges, or (2) sequential trials in which the prosecution at a second trial could re-litigate issues it lost at the first—exactly the type of "dry run" the Double Jeopardy Clause aims to prevent. *Ashe*, 397 U.S. at 447.

This Court should confirm that a choice between either an unfair trial or waiving one's right not to "be twice put in jeopardy of life or limb," U.S. Const. amend. V, is no choice at all—much less a voluntary waiver.

ARGUMENT

I. NO WAIVER OCCURS WHEN A CRIMINAL DEFENDANT IS FORCED TO SACRIFICE ONE IMPORTANT RIGHT TO SECURE ANOTHER

The decision below and others like it have held that, by choosing severance of charges to avoid a prejudicial trial, criminal defendants effectively waive the Double Jeopardy Clause's protection against a second trial on the same issues. *See, e.g.*, Pet. App. 10a (severance occurred "with the defendant's consent and for his benefit"); *United States v. Ashley Transfer & Storage Co.*, 858 F.2d 221, 227 (4th Cir. 1988) ("Where, as in this case, the defendants' choice and not government oppression caused the successive prosecutions, the defendants may not assert collateral estoppel as a bar against the government any more than they may plead

double jeopardy."). But that view rests on the flawed premise that the defendants exercised a legitimate choice. Sacrificing one important right to preserve another is no "choice" at all.

A. This Court Has Long Refused to Find Waiver Where a Defendant Is Put to a Hobson's Choice

Nearly fifty years ago, this Court found it "intolerable that one constitutional right should have to be surrendered in order to assert another." *Simmons v. United States*, 390 U.S. 377, 394 (1968). There, the lower court held that the defendant's testimony at a suppression hearing could later be used against him at trial. This Court reversed, holding that the defendant could not be put to the choice "either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination." *Id.* Notably, this Court rejected the lower court's conclusion that the defendant's "voluntary" choice to obtain the "benefit" of testifying to protect his Fourth Amendment rights waived his right against self-incrimination. *Id.* at 393-94.

Applying a similar rationale, this Court rejected a law that required an officer of a political party to either waive his right against self-incrimination and testify in response to a subpoena or else be barred from political office, thereby forgoing his First Amendment "right to participate in private, voluntary political associations." *Lefkowitz v. Cunningham*, 431 U.S. 801, 808 (1977). Citing *Simmons*, the Court explained that the law unfairly "require[d] [the officer] to forfeit one constitutionally protected right as the price for exercising another." *Id.* at 807-08.

Beyond situations involving an unfair choice between two constitutional rights, this Court has refused to find voluntary waiver when the "choice" was to forgo a constitutional right or face some serious hardship. In *Garrity v. New Jersey*, 385 U.S. 493 (1967), the Court found it impermissible to require public employees either to answer questions by criminal investigators, or else lose their jobs. "The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice . . . ." *Id.* at 497. This Court thus found statements made to investigators under such circumstances inadmissible, rejecting the argument that the defendants' voluntary choice to answer questions constituted a "waiver": "Where the choice is between the rock and the whirlpool, duress is inherent in deciding to waive one or the other." *Id.* at 498 (internal quotation marks omitted). In short, "[t]here are rights of constitutional stature whose exercise a State may not condition by the exaction of a price." *Id.* at 500; *accord Gardner v. Broderick*, 392 U.S. 273, 277-78 (1968) (holding that police officer appearing before grand jury could not be put to "Hobson's choice" of waiving immunity or losing job).

Similarly, the Court held that defendants could not be forced to "choose" between either contesting guilt at trial or avoiding a death penalty charge. *United States v. Jackson*, 390 U.S. 570, 581-82 (1968). The option to either risk one's life or exercise the right to a trial by jury was not a valid "choice"—the law "impose[d] an impermissible burden upon the exercise of a constitutional right." *Id.* at 572, 582-83.

And notably, this Court has found that a defendant does not waive the double jeopardy protection by exercising his right to challenge his conviction and successfully obtaining a reversal on appeal. *See Green v.*

United States, 355 U.S. 184, 191-92 (1957). "When a man has been convicted of second degree murder and given a long term of imprisonment it is wholly fictional to say that he 'chooses' to forego his constitutional defense of former jeopardy on a charge of murder in the first degree in order to secure a reversal of an erroneous conviction of the lesser offense. In short, he has no meaningful choice." *Id.* As the Court explained, "it cannot be imagined that the law would deny to a prisoner the correction of a fatal error unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States." *Id.* at 192.

Relying on this Court's precedents, federal courts of appeals likewise have rejected putting defendants to a Hobson's choice of sacrificing one important right to preserve another. Lower courts thus have held that a defendant cannot be put to sacrifice one constitutional right to secure another. *United States v. Inmon*, 568 F.2d 326, 333 (3d Cir. 1977) (under *Simmons*, a defendant cannot "be required, as the cost of litigating what he and his counsel believe to be a valid fifth amendment double jeopardy claim, to waive the fifth amendment privilege against self-incrimination in a later trial"). They likewise have rejected a "coerced choice" of having to forgo an important non-constitutional right in order to exercise a constitutional right. *Hunt v. Mitchell*, 261 F.3d 575, 584 (6th Cir. 2001) ("While [the defendant's] statutory right to a speedy trial under Ohio law may not equate precisely to his constitutional right to a speedy trial under the Sixth Amendment, the element of coerced choice decried by the Court in *Simmons* is nevertheless present here." (citation omitted)).

B. *Jeffers* Indicates That Sacrificing Double Jeopardy Rights to Avoid a Prejudicial Trial Is an Unfair Hobson's Choice

While not every hard choice a criminal defendant faces is invalid, the principles above apply with full force where "compelling the election impairs to an appreciable extent any of the policies behind the rights involved." *McGautha v. California*, 402 U.S. 183, 213 (1971), *judgment vacated sub nom.*, *Crampton v. Ohio*, 408 U.S. 941 (1972).

Indeed, after the Court decided *McGautha*, a plurality of this Court observed that forcing a defendant to choose between waiving double jeopardy protection or the admission of prejudicial evidence at a single trial could result in the very Hobson's choice this Court has found impermissible. In *Jeffers v. United States*, 432 U.S. 137 (1977), the defendant successfully opposed the government's motion for a consolidated trial on two indictments charging greater and lesser offenses. *Id.* at 143. After the jury convicted the defendant of the lesser offense, he sought to bar the prosecution from trying him for the greater offense in a second trial. *Id.* at 144. A plurality of this Court concluded that, "although a defendant is normally entitled to have charges on a greater and a lesser offense resolved in one proceeding," there was no double jeopardy violation because the defendant "elect[ed] to have the two offenses tried separately." *Id.* at 152. The Court reasoned in part that a single trial on lesser and greater offenses "could have taken place without undue prejudice to petitioner's Sixth Amendment right to a fair trial." *Id.* at 153.

Critically, however, the plurality noted that the outcome might be different—and that *Simmons* would

be implicated—had the defendant sought severance to avoid undue prejudice:

> Petitioner argues that a finding of waiver is inconsistent with the decision in *Simmons v. United States*, . . . where the Court held that a defendant could not be required to surrender his Fifth Amendment privilege against compulsory self-incrimination in order to assert an arguably valid Fourth Amendment claim. In petitioner's case, however, the alleged Hobson's choice between asserting the Sixth Amendment fair trial right and asserting the Fifth Amendment double jeopardy claim is illusory. Had petitioner asked for a . . . severance from the other defendants, the case might be different. In that event, he would have given the court an opportunity to ensure that prejudicial evidence relating only to other defendants would not have been introduced in his trial. . . . No such motion, however, was made. Under the circumstances of this case, therefore, no dilemma akin to that in *Simmons* arose.

Id. at 153 n.21. As explained below, Currier faced precisely such a "dilemma" in the present case.

II. A DEFENDANT DOES NOT WAIVE DOUBLE JEOPARDY RIGHTS BY CHOOSING SEVERANCE TO AVOID AN UNFAIR TRIAL

Under the decision below, a defendant charged with felon-in-possession and other offenses faces the sort of Hobson's choice that this Court has held cannot constitute a valid waiver. On the one hand, if the defendant chooses a single trial of all charges, the jury

would learn of his prior conviction, unduly prejudicing him with respect to the substantive charges. On the other hand, if the defendant chooses to sever the felon-in-possession charge, he waives his double jeopardy rights if the first jury acquits. In either event, the defendant must sacrifice one important right to preserve the other. Neither can constitute a valid waiver.

A. Evidence of a Prior Felony Is Unduly Prejudicial

1. This Court "has long recognized . . . [that] the introduction of evidence of a defendant's prior crimes risks significant prejudice." *Almendarez-Torres v. United States*, 523 U.S. 224, 235 (1998). This principle derives from a "common-law tradition" in which a "defendant's prior trouble with the law . . . [or] specific criminal acts . . . [were] said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record." *Michelson v. United States*, 335 U.S. 469, 475-76 (1948).

The Federal Rules of Evidence incorporate protections against such prejudice. Rule 403 permits exclusion of evidence if its probative value is substantially outweighed by a danger of unfair prejudice. For criminal defendants, "unfair prejudice . . . speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief v. United States*, 519 U.S. 172, 180 (1997) (internal quotation marks omitted). One of the evils that Rule 403 seeks to eliminate is the use of propensity evidence to convict a defendant. As this Court has observed, "[a]lthough . . . propensity evidence is relevant, the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves

punishment—creates a prejudicial effect that outweighs ordinary relevance." *Id.* at 181 (second alteration in original) (internal quotation marks omitted).

Other rules likewise seek to guard against the inherent prejudice from a jury hearing about a defendant's prior crimes. Rule 404(b) specifically excludes "[e]vidence of a crime, wrong, or other act" offered "to prove a person's character" and thereby the person's likelihood of committing other crimes. Fed. R. Evid. 404(b)(1).

The Federal Rules of Criminal Procedure employ safeguards based on the same principles. While Rule 8(a) authorizes joinder of multiple charges in a single indictment, Rule 14 allows courts to sever charges if sufficient prejudice would result from a single trial.

2. These rules are backed up by decades of studies showing the inherent prejudice that occurs when a jury is informed of a defendant's prior convictions. *See* Kathryn Stanchi & Deirdre Bowen, *This Is Your Sword: How Damaging Are Prior Convictions to Plaintiffs in Civil Trials?*, 89 Wash. L. Rev. 901, 911 & n.36 (2014) (collecting studies). "Most studies show that admission of a defendant's prior conviction leads to more guilty verdicts in criminal trials . . . ." *Id.* at 911.

Studies generally have shown that "[t]he evidence against a defendant with a prior record appears stronger to [a] jury" because jurors use past convictions "to develop propensity judgments and other generally negative evaluations of a defendant." Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 Cornell L. Rev. 1353, 1361 (2009).

For example, a study of 160 mock jurors found that disclosure of a defendant's prior conviction substantially increased the number of jurors who reached a guilty verdict after reading the facts of the case, witness and defendant testimony, and jury instructions. *See* Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 L. & Hum. Behav. 37, 39, 41-43 (1985). Mock jurors were also twice as likely to convict an alleged auto thief if he had a prior conviction for a dissimilar crime, and even more likely to convict when they learned that the defendant had a prior auto theft conviction. *See id.* at 43 tbl.2. These results hold true for defendants charged with murder. *See id.* Overall, mock jurors elected to convict defendants with prior criminal records at significantly higher rates than defendants who lacked any criminal history. *See id.*

In another study of 105 participants given a summary of a real bank-robbery trial transcript, 40% of the subjects voted to convict when told that the defendant had a prior conviction, versus only 17% of subjects who were unaware of any prior conviction. *See* Edith Greene & Mary Dodge, *The Influence of Prior Record Evidence on Juror Decision Making*, 19 L. & Hum. Behav. 67, 70-72 (1995). Subjects who learned of the prior conviction also viewed the defendant as "less credible and more dangerous." *Id.* at 74.

Analyses of actual trials generally have shown similar results. One study evaluating juror questionnaires distributed following trials in multiple jurisdictions found that jurors were more likely to convict after learning of a prior conviction when the jurors otherwise found the evidence weak; the effect of learning of the prior conviction was not pronounced in cases

where jurors felt that the evidence was already strong. *See* Eisenberg and Hans, *supra*, at 1386. Thus, in cases with weaker evidence of guilt, "[t]he prior record effectively leverage[d] the existing evidence over the threshold needed to support conviction." *Id.* at 1385. While some have questioned the full extent of such prejudice, *see* Larry Laudan & Ronald J. Allen, *The Devastating Impact of Prior Crimes Evidence and Other Myths of the Criminal Justice Process*, 101 J. Crim. L. & Criminology 493, 497-500 (2011), the consensus remains that informing a jury of a defendant's prior conviction is unduly prejudicial, *see, e.g.*, 1 Edward J. Imwinkelried, Uncharged Misconduct Evidence § 1.2 (2016) (summarizing consensus in literature); Richard Lempert, *The American Jury System: A Synthetic Overview*, 90 Chi.-Kent L. Rev. 825, 833 n.19 (2015) (similar).

Evidence of a prior conviction is so prejudicial, studies show, that its effect on jurors cannot be mitigated by a judge's limiting instructions. To the contrary, instructions intended to restrict the jury's consideration of a prior conviction may actually "backfire," increasing the prejudice to the defendant by calling the jury's attention to his prior criminal record. David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 Stan. L. Rev. 407, 425-30 (2013); *see also* Stanchi & Bowen, *supra*, at 911 n.36 (collecting studies). "[L]imiting instructions are not a reliable method for eliminating the negative impact of criminal records." Eisenberg & Hans, *supra*, at 1361. "With few exceptions, empirical research has repeatedly demonstrated that . . . limiting instructions are unsuccessful at controlling jurors' cognitive processes." Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity*

and Other Inadmissible Evidence, 6 Psychol., Pub. Pol'y, & L. 677, 686 (2000).

Lower courts and members of this Court have recognized the ineffectiveness of limiting instructions in this context. Adhering to such a limiting instruction is "a mental gymnastic which is beyond, not only [a jury's] powers, but anybody's else." *See Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932) (Hand, J.). "[A]ll practicing lawyers know to be unmitigated fiction" the notion "that prejudicial effects can be overcome by instructions to the jury." *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring). Certain categories of evidence "are at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, whatever instructions the trial judge might give." *Bruton v. United States*, 391 U.S. 123, 138 (1968) (Stewart, J., concurring).

Moreover, although many studies do not distinguish among prior convictions, research suggests that both the nature of the prior offense and its similarity to the present charge negatively impact jurors' impressions of a defendant. *See* Eisenberg & Hans, *supra*, at 1361. As this Court has observed, "[w]here a prior conviction was for a gun crime or one similar to other charges in a pending case[,] the risk of unfair prejudice would be especially obvious." *Old Chief*, 519 U.S. at 185.

3. Studies reporting the prejudicial effect of prior conviction evidence are consistent with common sense, as well as the experiences of felons outside the judicial system. Stigma against individuals like Currier based on a prior felony conviction manifests in a variety of contexts well beyond the courtroom doors. In employment, a prior felony conviction makes securing a

second interview or a job offer substantially more difficult. *See* Devah Pager et al., *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 Annals Am. Acad. Pol. & Soc. Sci. 195, 199 (2009). Empirical inquiries have revealed a pronounced negative impact of a prior conviction on employment outcomes, and have anecdotally revealed that many employers use criminal records as a screening mechanism for applicants. *See* Devah Pager, *The Mark of a Criminal Record*, 108 Am. J. Soc. 937, 955-56 (2003). In post-secondary education, many colleges and universities now collect and examine applicants' criminal histories as a component of the admissions process, thereby erecting an additional barrier to advancement for individuals with prior convictions. *See* Matthew W. Pierce et al., *The Use of Criminal History Information in College Admissions Decisions*, 13 J. Sch. Violence 359, 360 (2014).

More broadly, studies reveal deeply negative public attitudes towards those previously incarcerated. *See* Candalyn B. Rade et al., *A Meta-Analysis of Public Attitudes Toward Ex-Offenders*, 43 Crim. Just. & Behav. 1260, 1260-63 (2016). Stigma and prejudice against prior offenders result in public desire to maintain social distance and erect barriers to accessing community resources and housing. *Id.* at 1260-61. These impacts are more acute and pronounced for felons than misdemeanants. *Id.* at 1262.

4. In light of the deeply rooted prejudices that juries and society at large harbor against felons, "[a] defendant's interest in avoiding introduction of prior crimes evidence [at trial] is clear and compelling." *United States v. Dockery*, 955 F.2d 50, 53 (D.C. Cir. 1992). When a defendant is tried on felon-in-possession and

other charges simultaneously, there is an obvious risk that the defendant will suffer the "unfair prejudice" of the jury "generalizing [the] defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged (or, worse, as calling for preventive conviction even if he should happen to be innocent momentarily)." *Old Chief*, 519 U.S. at 180-81. In *Old Chief*, the defendant, concerned that admission of his prior felony conviction would unduly influence the jury with respect to his felon-in-possession charge, offered to stipulate to his status as a convicted felon. *Id.* at 175. This Court held that admission of a prior felony conviction, over a defendant's offer to stipulate, was reversible error because the "admi[ssion] . . . of the defendant's prior crimes . . . raises the risk of a verdict tainted by improper considerations." *Id.* at 197 (internal quotation marks omitted).

For these reasons, "[a]ll of the Circuit Courts seem to agree that trying a felon in possession count together with other felony charges creates a very dangerous situation because the jury might improperly consider the evidence of a prior conviction when deliberating about the other felony charges . . . ." *United States v. Nguyen*, 88 F.3d 812, 815 (9th Cir. 1996); *see also United States v. Miles*, 96 F.3d 491, 495 (D.C. Cir. 1996) ("We have long recognized that where a felon-in-possession charge is joined with other counts, the defendant may be unduly prejudiced with respect to the other counts by the introduction of prior crimes evidence . . . .").

Admitting evidence of a defendant's prior felony convictions can "rise to the level of a constitutional violation . . . if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial."

United States v. Lane, 474 U.S. 438, 446 n.8 (1986). "In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause . . . provides a mechanism for relief." *Payne v. Tennessee*, 501 U.S. 808, 825 (1991); *see also, e.g.*, *Doyle v. Ohio*, 426 U.S. 610, 618-19 (1976) (holding that admission at trial of defendants' post-arrest silence violated due process); *Foster v. California*, 394 U.S. 440, 442-43 (1969) (holding that use of overly suggestive identification procedure for purpose of identifying suspect violated due process).

But under the decision below, a defendant must accept the admission of unduly prejudicial evidence in a single trial on felon-in-possession and other charges, or incur a forced waiver of the double jeopardy protection against re-litigation of issues the prosecution already lost in a first trial.

B. Allowing Prosecutors to Re-litigate Issues They Lost Is Antithetical to the Double Jeopardy Clause

While a single trial on felon-in-possession and other charges is unduly prejudicial to the defendant, so too is the prospect of allowing the prosecution, at a second trial, to re-litigate issues that it lost at the first.

1. The "underlying idea" of the Double Jeopardy Clause is that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity." *Green v. United States*, 355 U.S. 184, 187 (1957). "[P]ermitting the sovereign freely to subject the citizen to a second trial for

the same offense would arm [the] Government with a potent instrument of oppression." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977). Importantly, the issue preclusion component of the Double Jeopardy Clause "precludes the Government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial." *Yeager v. United States*, 557 U.S. 110, 119 (2009).

Issue preclusion secures the finality and sanctity of acquittals, "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence." *Martin Linen*, 430 U.S. at 571. "[T]he primary purpose of the Double Jeopardy Clause was to protect the integrity of a final judgment [of acquittal]." *United States v. Scott*, 437 U.S. 82, 92 (1978). Verdicts of acquittal accordingly are entitled to "special weight," *Tibbs v. Florida*, 457 U.S. 31, 41 (1982), and "particular significance," *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980) (internal quotation marks omitted).

Issue preclusion also prevents the unfairness of allowing the prosecution a practice run of trying a defendant more than once. "[I]f the Government may reprosecute, it gains an advantage from what it learns at the first trial about the strengths of the defense case and the weaknesses of its own." *Id.* at 128. Indeed, the Court in *Ashe* forcefully rejected prosecutors' admitted use of a first trial as a "dry run" for an acquitted defendant's subsequent prosecution on charges stemming from the same criminal episode in which a jury had already found the defendant did not participate. 397 U.S. at 447. The second jury in *Ashe* convicted the defendant after hearing testimony that was "substantially stronger" on a key issue than the prosecution had offered at the first trial, which ended in acquittal. *Id.* at 440. Such an outcome is "precisely

what the constitutional guarantee forbids." *Id.* at 447. The prohibition against affording the government "the proverbial 'second bite at the apple'" is "central to the objective of the [Clause's] prohibition against successive trials." *Burks v. United States*, 437 U.S. 1, 11, 17 (1978).

Here, Currier's second trial presented all of the problems with sequential prosecutions that the Double Jeopardy Clause aims to prevent. After two prosecution witnesses floundered in the first trial, prosecutors returned at the second trial with more polished witnesses whose testimony was sought to prove that Currier was at the scene of the crime. *Compare* J.A. 16, *with id.* at 72-73. After having evidence (a cigarette butt found in the co-defendant's truck) excluded from the first trial for failure to turn it over to the defense in time, the prosecution fixed the procedural violation and used the cigarette butt to convict Currier in the second trial. *Compare id.* at 31-32, *with id.* at 83-84. The evidence was weak because Currier and his co-defendant were friends, and thus Currier might have ridden in the truck and smoked the cigarette at any time, not just the day of the crime. But bolstered by the enhanced witness testimony, prosecutors leveraged the cigarette-butt evidence as proof that Currier was at the scene. All of this was *after* the first jury had already determined that Currier was not at the scene and played no role in the theft. Providing the prosecution an opportunity to refine its case after an acquittal is "precisely what the constitutional guarantee forbids." *Ashe*, 397 U.S. at 447.

2. While defendants need not establish prosecutorial abuse to invoke issue preclusion under *Ashe*, *see* Pet. Br. 18-23, the Court in *Ashe* recognized that issue

preclusion protects against prosecutorial overreaching. Unlike in English common law and early American practice, in which "[a] single course of criminal conduct was likely to yield but a single offense," the higher volume of overlapping but highly specific modern criminal statutes makes it "possible for prosecutors to spin out a startingly numerous series of offenses from a single alleged criminal transaction," rendering "the potential for unfair and abusive reprosecutions . . . far more pronounced." *Ashe*, 397 U.S. at 445 n.10.

This concern is particularly acute here, where the felon-in-possession charge was premised on the theory that petitioner briefly "handle[d]" the guns inside the safe and "la[id] them down on the bed" of the truck in order to remove the cash. J.A. 94. There was no allegation that petitioner "possessed" the guns for any purpose other than moving them aside to get to the money in the safe. To the contrary, the prosecution's theory was that petitioner discarded the safe and guns in a river after removing the cash. Thus, Currier's "possession" of the weapons in this case "d[id] not offend" a key goal of felon-in-possession laws—to "keep[] guns out of the hands of convicted felons." *United States v. Mason*, 233 F.3d 619, 624 (D.C. Cir. 2000). The felon-in-possession charge against Currier was aggressive and tenuous at best. But it allowed the prosecution to try petitioner twice for the same alleged criminal episode. The decision below thus could encourage similar overcharging.

In sum, while severing the felon-in-possession charge avoids the risk of undue prejudice from the prior conviction, the option to endure a second trial and "run the gantlet a second time" is no more favorable. *Ashe*, 397 U.S. at 446 (internal quotation marks omitted). Under this Court's precedents, putting a defendant to the choice of waiving one right or the other is "intolerable." *Simmons*, 390 U.S. at 394.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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